Supreme Court, U.S.
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No. 85-1107

In the Supreme Court of the United States
October Term, 1985

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, et al.,

Petitioners,

vs.

WILLIAM F. MURPHY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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January 27, 1986

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Courts below properly determined the amount of attorney fees to which Respondent was entitled under the "Common Benefit" exception to the "American Rule" by reference to the number of hours reasonably expended on the litigation multiplied by a reasonable "prevailing market" hourly rate pursuant to a modified "lodestar" standard because the "results obtained" did not warrant a downward adjustment and Petitioners failed to establish any other basis for a downward adjustment?

2. Whether Petitioners are barred from contesting the calculation of the amount of attorney's fees awarded because they agreed to waive evident iary hearing and consented to the District Court determining the amount of counsel fees on

the basis of the affidavits of hours expended and rates charged by Respondent's counsel and of hourly charges of comparable attorneys in the community for like services?

3. Whether this Court ought to consider a question not presented to or passed upon by the Court of Appeals, overrule its decision in Hall v. Cole and the decision of every other court which has considered the issue and hold that the existence of a fee obligation is a prerequisite to the award of attorneys fees under the "common benefit" equitable doctrine to the "American Rule" in LMRDA proceedings thereby unjustly enriching union members at the expense of Plaintiff's attorney and restricting the future opportunity of union members to vindicate their LMRDA rights?

4. Whether the attorney fee award

subject of requested review is independently supportable under applicable pendent state law and under the "Bad Faith" exception to the "American Rule" on account of Petitioners' outrageous misconduct which gave rise to Respondent's substantive claims?

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COUNTER-STATEMENT OF THE CASE

This proceeding was brought by Respondent, William F. Murphy, a member of a reform faction of a corruptly administered labor organization, who was the target of the entrenched union officers' systematic policy of crushing dissent by starving-out, driving-out, and, if necessary, wiping-out opponents.

The Complaint for reinstatement, damages, and injunctive relief was filed on December 21, 1973 under Sections 101 and 102 of the Labor-Management Reporting and Disclosure Act of 1959, (29 U.S.C. Sections 411, 412) (hereinafter "LMRDA"), charging that Local 18 of the International Union of Operating Engineers and five of its officer-business agent employees, John Possehl, (Business Manager); Charles Rutherford, (President); John Frank, (Vice-President); Frank

Miller, (Conductor and currently the Business Manager); and S. A. Blair, (Chairman, Elections Committee), conspired to suppress dissent and perpetuate themselves and other members of their administration in office and power and in pursuit of this objective systematically attempted to:

1. wipe Murphy out of the Union by a planned campaign of violence as a result of which Plaintiff was severely beaten-up on two occasions,

2. starve Murphy out of the Union by covert manipulation of Local 18's exclusive hiring hall system so as to deprive him of job opportunities, and

3. drive Murphy out of the Union by suspending him from membership after a "Kangeroo" trial whose processes were manipulated to convict him

> and to which numbers of out-of-town members were transported under instructions from the officers to vote "guilty."

On May 23, 1975 Murphy moved for a Preliminary Injunction alleging that Defendants had violated his LMRDA rights by refusing to reinstate him to Union membership following the expiration of his two years suspension but, instead, secretly voting at an Executive Board meeting to expel him because he had filed "litigations" against Local 18. On June 5, 1975 the Court below ordered Murphy reinstated as a member in good standing retroactively effective to May 15, 1974, the date on which the period of suspension ended.

After motions to dismiss and for summary judgment had been denied, trial before Judge Thomas D. Lambros sitting

without jury, commenced on February 26, 1976, continued intermittently for twenty-three days and concluded on January 4, 1977.

At the close of the evidence Murphy moved to further amend his Complaint pursuant to F.R.C.P. No. 15(b) to state claims inter alia, under several additional sections of the Labor-Management Reporting and Disclosure Act of 1959, viz., 29 U.S.C. Sections 414, 440, 481(c), 483, 501(a), 523, 529 and 530; the Civil Rights Act; 42 U.S.C. Section 1985(3); Section 301 of the Labor Management Relations Act; 29 U.S.C. Section 185 and six (6) pendent state law claims, viz, assault and battery; breach of contract; tortious interference with union associational rights; breach of fiduciary duty; and conspiracy.

On July 18, 1978 Judge Lambros filed

his Findings of Fact and Conclusions of Law.

In an Opinion remarkable for its thoroughness, comprehensiveness and clarity, the Court below found the evidence established the existence of a conspiracy to suppress the dissident movement and injure Murphy through the perpetration of unlawful acts and violations of his rights under federal and state law. (F.F. 97, 117; pp. A.154-158., A.281-282).

Accordingly, Judge Lambros held that Murphy had been:

1. arbitrarily and discriminatorily fined, suspended and otherwise disciplined in violation of 29 U.S.C. Sections 411(a)(5) and 529, (F.F. 101-E; pp. A.198-199) and his state law contractual rights (F.F. 114A; pp. A.276-277);

2. Secretly expelled and

officially excluded from participation in Union activities for exercising his federally protected rights in violation of 29 U.S.C. Sections 412 and 529 (F.F. 102 C.1.; pp. A.204-205);

3. Subjected to intimidation, physical violence and economic discrimination in retaliation for his status and activities as a member of the dissident political faction of Local 18 in violation of Sections 29 U.S.C. Section 411(a)(1) and (2) (F.F. 102 B.1.; pp. A.199-202);

4. arbitrarily, discriminatorily and officially barred from use of the job referral system and hence prevented from obtaining employment in violation of 29 U.S.C. Sections 411(a)(5) and 529. (F.F. 102 E.1., 2; pp. A.222-224) and 29 U.S.C. Section 185 (F.F. 108; pp. A.249-251);

5. Deprived of his L.M.R.D.A. rights as a

result of a class-based, invidiously discriminatory conspiracy in violation of the Civil Rights Act, 42 U.S.C. Section 1985(3) (F.F. 110. g; pp. A.265);

6. Physically assaulted and beaten at two Union meetings by agents covertly acting at the direction of the Union and Defendants Possehl and Frank in violation of his state law rights (F.F. 113; pp. A.275-276), and

7. Entitled to sue on behalf of the membership to recover for the Union treasury Union funds diverted by Defendant Possehl to defend civil and criminal actions brought by Murphy and other dissidents against tortfeasors secretly acting at Possehl's direction. (F.F. 116; pp. A.280-281).

Judge Lambros accordingly awarded relief as follows:

1. Compensatory damages,

against Defendants Possehl, Frank and the Union, jointly and severally, in an amount to be determined, for Murphy's loss of wages, retirement benefits, and employment opportunities under 29 U.S.C. Sections 411, 412 and against the Union upon pendent State Law claims for breach of the implied contract between a Union and its members.

2. Compensatory damages under 29 U.S.C. Sections 411 and 412, against Defendants Possehl, Frank and the Union, jointly and severally, in the amount of Ten Thousand Dollars ($10,000) for Plaintiff's pain and suffering, humiliation, emotional distress, mental anguish and deprivation of the right to engage in union activities for a period of two years, and upon pendent State Law claims for the tort of assault and battery. The compensation awarded against

the three defendants for humiliation, embarrassment, pain and suffering, mental anguish and emotional distress was also founded upon 42 U.S.C. Section 1985(3).

3. Damages in the amount of Three Thousand Five Hundred Dollars ($3,500) payable to the Treasury of Local 18 against Defendant Possehl.

4. Punitive damages in the amount of Thirty Thousand Dollars ($30,000) against Defendant Possehl; in the amount of Twenty Thousand Dollars ($20,000) against Defendant Frank, and in the amount of One Hundred Fifty Thousand Dollars ($150,000) against Local 18 upon pendent State Law claims for assault and battery and conspiracy and under 42 U.S.C. Section 1985(3). The award against the Union was further based upon 29 U.S.C. Section 185.

5. Injunctive relief under 29 U.S.C.

> Sections 411 and 529, and 29 U.S.C. Section 185, as well as under pendent State Law, permanently enjoining the Union from interfering with Plaintiff's exercise of his Section 411 rights, and discriminating against Plaintiff in the operation of the referral system. To insure against abuse, the Court ordered that the referral cards of registrants and all work orders were to be dated and time-stamped; lists of the work orders received were to be compiled and posted for seven days in each District office not less frequently than every 120 days, and finally, the referral deck was to be made available to members for inspection and copying for a reasonable period of time immediately prior to and following each district meeting.
>
> (pp. A.313-314 and A.374-375).

Taking judicial notice of the death

of Defendant Possehl subsequent to the trial, however, the Court vacated the punitive damages award against him and omitted from its judgment entry the award of Three Thousand Five Hundred Dollars ($3,500) against him.

The punitive damage award against Defendant Frank was made subject to vacation upon Frank agreeing to refrain from holding any office in the Union for a period of five years.

The punitive damage award against Local 18 was made subject to vacation upon the submission of a plan for adoption as an order of the Court which would "ensure that the channels of communication among and to the membership of Local 18 remain open and accessible to all serious candidates for union office" and address in a meaningful fashion the Court's concern with suppression of dissent and

development of democratic union processes. (p. A-311)

All other claims advanced by Murphy were denied, and judgment was entered in favor of Defendants Rutherford, Blair and Miller on all counts.

The Court deferred consideration of Murphy's Motion for Attorneys Fees pending further submission of the parties.

On October 17, 1978, the Defendant Union filed its proposed plan for the enhancement of communication among members and the democratization of its processes, and subsequently moved to vacate the punitive damage award.

On September 3, 1980 a motion was made to vacate the punitive damage award against the Defendant John Frank.

A series of post-judgment conferences were held by Judge Lambros with counsel for the parties concerning the issue of

attorneys fees, the minutes of which were filed on June 23, 1980, September 8, 1980 and October 2, 1980.

Pursuant to agreement reached among counsel at conference with the Court on October 2, 1980, issues of Plaintiff's entitlement to an award of attorney's fees and the amount of such award were left for determination by the Court, without hearing, upon the affidavits of Murphy's counsel itemizing the hours expended in the cause and their hourly charges, and the filing by the parties of the affidavits reflecting hourly charges of attorneys in the Greater Cleveland Area for comparable services.

On September 15, 1981 Plaintiff moved for contempt sanctions against Defendant Local 18 and its then Business Manager Earl A. Erwin for failure to comply with the Court's injunctive order respecting

the time-stamping and posting of work orders and registration cards and the right of the members to inspect and copy certain data from those records.

On November 30, 1981 the Court issued a post-judgment order which, as amended on December 2, 1981, directed Local 18 through its Business Manager Earl A. Erwin to implement fully on or before December 31, 1981, the injunctive relief set forth in the Court's judgment dated July 18, 1978.

On February 1, 1982 Plaintiff again moved for contempt sanctions on the ground that the Defendants had remained recalcitrant and had failed to comply with the Court's post-judgment orders respecting the operation of the referral system.

To resolve the motion for sanctions, the contempt proceedings were referred to

Magistrate David S. Perelman for the purpose of developing, with the participation of counsel, a plan to reform the referral system operation consistent with the objectives of the Court's order.

A proposal respecting the subsequent operations of the referral system was ultimately drafted and submitted to the Court.

On October 14, 1982 Judge Lambros issued a Post-Judgment Memorandum Opinion and Order.

Therein, the Court vacated the punitive damage award against the Union and adopted as part of its injunctive relief the following additional proposals advanced by the Union:

1. Publication in the May and October issues of the Buckeye Engineer of Title I, "the Bill of Rights" of the Labor Management Reporting and Disclos-

ure Act of 1959.

2. Publication of a notice in this newsletter, that copies of the Union's Constitution and By-Laws are available in the Union office on request.

3. Publication in the newsletter prior to each election of all provisions of the Constitution and By-Laws pertaining to such election.

4. Publication in the newsletter prior to each election a notice that two publications of the Department of Labor, "Electing Union Officers" and "Rights and Responsibilities under the LMRDA", are available on request.

5. Allowing each "major candidate" five minutes to speak at a general membership meeting and a district meeting during the period between nominations and election.

6. Allowing each candidate to inspect, but not copy, a list of the names and last

known addresses of all members for up to "two eight (8) hours days".

The Court also incorporated in its injunctive relief the terms of the proposed settlement of Murphy's then pending motion for contempt sanctions against the Union for failing to comply with the Court's remedial order respecting the operation of the referral system, and treated the contempt motion as having been withdrawn.

The terms for reform of the referral system included:

1. An "anti-steering" provision prohibiting agents of the Union from recommending to employers the requesting of designated members for job opportunities.

2. An anti-discrimination clause prohibiting agents of the Union from suggesting to employers not to request a particular member for employment

or to terminate the employment of any member.

3. Standardization of equipment categories for purposes of filling job orders.

4. Date and time-stamping of registration cards, and job orders.

5. The equipping of dispatch telephones with an adequate telephone recording device to provide a verifiable means of recording the sequence of job referral calls made, the time and date of such calls and the conversations.

6. Weekly posting of job orders and the dispatches made pursuant thereto.

7. Allowing members to inspect registration cards before and after Union meetings, and to copy once every 15 days from up to ten (10) registration cards of members who had been dispatched to jobs during the preceding period.

8. Formulation of work referral rules and the posting thereof in such district office. (pp. A.433-453).

After defendant John Frank agreed to refrain from seeking or holding any office in Local 18 for a period of five (5) years, the Court below also granted the Defendants' Motion to Vacate the Award of Punitive Damages against him.

Finally, the Court determined that Murphy was entitled to the award of a reasonable attorneys' fee because (1) Defendants had acted maliciously and in bad faith against him, (2) the vindication of Murphy's rights resulted in a "common benefit" to the Union and its members and (3) Murphy was the prevailing party in a proceeding to enforce the provisions of 42 U.S.C. Section 1985(3) within the meaning of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988. (pp.

A.401-413).

Applying the Sixth Circuit's guidelines in Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979) for the calculation of attorneys fees, the Court below awarded counsel fees to Murphy's lead counsel in the amount of $100,232.50 and to co-counsel in the amount of $33,107.50. (pp. A.413-426). The Court also awarded costs against Defendants in the amount of $1,821.46.

Thereafter, Defendants appealed from the District Court's Judgments of July 18, 1978 and October 14, 1982. Murphy cross-appealed the vacation of the punitive damages award against Local 18, and the District Court's refusal to tax his expert witness fees as costs and to order the Union to offer dissidents equal access to the Union's monthly newsletter.

On September 30, 1985 the Sixth Circuit Court of Appeals, speaking through Judge Albert J. Engel, affirmed the District Court's judgments.

The Sixth Circuit determined that although Murphy's Civil Rights claim under 42 U.S.C. Section 1985(3) was barred by its decision in Shimman v. Local 18, 744 F.2d 1226 (6th Cir. 1984) (en banc), cert. denied, 105 S.Ct. 1191 (1985), all of the District Court's findings as to liability of the Defendants and all of the compensation and equitable relief afforded Murphy were properly founded upon the Labor Management Reporting and Disclosure Act, 29 U.S.C. Sections 411, 412 (pp. A.491). Accordingly, the Court found it unnecessary to review the other independent and essentially cumulative state and federal law grounds relied upon by the District Court (p. A.491).

Responding to the Union's challenge, the Court of Appeals noted that the District Court's award of attorneys' fees to Murphy could not be upheld either under the Civil Rights Attorney Fee Act of 1976, 42 U.S.C. Section 1988, since Murphy's claim under 42 U.S.C. Section 1985(3) was barred, or upon the "bad faith" exception to the American Rule since the Union's bad faith was found in its conduct giving rise to the substantive claim and the rule in the Sixth Circuit was that the bad faith had to be manifest in the bringing or conducting of the litigation. (pp. A.486-487) Shimman v. International Union of Operating Engineers, Local 18, 744 F.2d 1226, 1233 (6th Cir. 1984) (en banc), cert. denied, 105 S.Ct. 1191 (1985).

Nonetheless, the Court held that "Murphy had demonstrated fully his entitlement to recovery of attorneys' fees

on a 'common benefit' theory." (A-487)

Rejecting the Union's further contention that the amount of the award was excessive because the District Court failed to take into account the asserted lack of success Murphy allegedly achieved, the Sixth Circuit held "Murphy's claims were closely interrelated and arose from one common core of facts" and that "Murphy received compensatory damages and injunctive relief that signified a substantial victory." (pp. A.489-490) The Court of Appeals further held that the District Court's calculation of attorneys' fees based upon a determination of the number of hours reasonably expended and a reasonable hourly rate of compensation was a proper approach and would subsume and take into account all of the relevant factors identified in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th

Cir. 1974) and other "check-list" decisions. (pp. A.488-490)

The instant Petition For Certiorari was filed by the Union on December 26, 1985.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW PROPERLY DETERMINED THE AMOUNT OF ATTORNEY FEES TO WHICH RESPONDENT WAS ENTITLED UNDER THE "COMMON BENEFIT" EXCEPTION TO THE "AMERICAN RULE" BY REFERENCE TO THE NUMBER OF HOURS REASONABLY EXPENDED ON THE LITIGATION MULTIPLIED BY A REASONABLE "PREVAILING MARKET" HOURLY RATE AS REQUIRED BY THE MODIFIED "LODESTAR" STANDARD ADOPTED IN NORTHCROSS v. BOARD OF EDUCATION OF MEMPHIS CITY SCHOOLS BECAUSE THE "RESULTS OBTAINED" DID NOT WARRANT A DOWNWARD ADJUSTMENT AND PETITIONERS FAILED TO ESTABLISH ANY OTHER BASIS FOR A DOWNWARD ADJUSTMENT.

A. The Modified "Lodestar" Standard Adopted By The Sixth Circuit In Northcross v. Board Of Education Of Memphis City Schools Is An Appropriate Standard For Determining The Amount Of Attorney Fees To Which Respondent Is Entitled Under The "Common Benefit" Exception To The "American Rule," And Is Fully Consistent With The Standards Established By This Court And Those Applied By Other Circuits Pursuant To Fee Shifting Statutes And The Exercise Of The Courts' Equitable Powers.

The District Court found that Respondent was entitled to reasonable attorney fees pursuant to 29 U.S.C. Section 412, on account of the vindication of rights enumerated in 29 U.S.C. Section 411, on both the "common benefit" and "bad faith" exceptions to the "American Rule." (A-401-408) The District Court also found attorney fees were recoverable under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988. (A-410-412). In order to achieve a "uniform approach" to fee determination, the District Court applied the analysis of Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980) (hereinafter "Northcross").

In Northcross the Sixth Circuit adopted the modified "lodestar" approach popularized by the Third Circuit's

decisions in Lindy Brothers Builders Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973), appeal following remand, 540 F.2d 102 (3rd Cir. 1976), and required, subject to specified adjustments, an initial calculation of Section 1988 fees, to be based upon the number of hours reasonably expended at a "fair market" hourly rate. As to the latter element, the Court stated that for counsel who do not maintain a private practice "rates customarily charged in the community may be consulted for guidance." (A-420; 611 F.2d at 636-638).

Petitioners assert that the Northcross analysis is contrary to that adopted by every other circuit and to the standard enunciated by this Court in Hensley v. Eckerhart, 461 U.S. 424 (1983) (hereinafter "Hensley") (Petition, pp. 8,

10, 11, 18). They are plainly wrong.

First, Petitioners seem to complain that the Northcross standard, as applied by the Courts below, fails to consider any of the twelve "factors" identified in Johnson v. Georgia Highway Express, 488 F2d 714 (5th Cir. 1974) (hereinafter "Johnson").

The Johnson "checklist" approach was initially relied upon by the Sixth Circuit in Monroe v. County Board of Education, 505 F2d 109 (6th Cir. 1974), but abandoned in Northcross:

> "We have learned through experience, however, that merely providing a check list of factors to consider does not lead to consistent results, or, in many cases, reasonable fees. Many of the factors are overlapping, and there is no guidance as to the relative importance of each factor, or, indeed, how they are to be applied in a given case." 611 F.2d at 642.

Similar criticism had been directed at Johnson by courts and commentators, e.g., Copeland v. Marshall, 641 F2d 880, 890 (D.C. Cir. 1980) (en banc); Bishop v. Furtado, 635 F2d 915, 920 (1st Cir. 1980); Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U. Pa. L. Rev. 281, 285-287, 292 (1977).

In consequence, "those circuits that established their fee-setting procedures after Lindy and Johnson, and had an opportunity to study both systems, have chosen Lindy as the better rule." Court Awarded Attorney Fees Report of the Third Circuit Task Force, October 8, 1985, 771 F.2d (No. 2) 14.

Indeed, even the Fifth Circuit moved to the lodestar approach in Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983).

There may be, however, less differences between the Lindy and Johnson

approaches than meets the eye, because many of the Johnson factors are subsumed and considered in the determination of the appropriate number of hours and the hourly rate.

Thus, the Sixth Circuit in Northcross stated:

> "We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all the relevant factors, and will lead to a reasonable result. The number of hours of work will automatically reflect the 'time and labor involved,' 'the novelty and difficulty of the question,' and 'preclusion of other employment.' The attorneys normal hourly billing rate will reflect 'the skill requisite to perform the legal service properly,' 'the customary fee,' and the 'experience, reputation and ability of the attorney.' Adjustments upwards may be made to reflect the contingency of the fee, unusual time limitations and the

> 'undesirability' of the case. Thus, applying the approach used in this decision will result in an award reflecting those considerations traditionally looked to in making fee awards, but will also provide a logical, analytical framework which should largely eliminate arbitrary awards based solely on a judge's predispositions or instincts." 611 F.2d at 642-643.

Specifically, the Court noted that the number of hours submitted may be reviewed and reduced, e.g., "for duplication, padding or frivolous claims" or for other reasons provided the hours are identified and the reason for their elimination articulated. 611 F.2d at 636-637.

Further, the determination of the fair market value of services rendered may take into account a differentiation between trial and office rates and whether the services could have been performed by

less expensive personnel. 611 F.2d at 637-638.

The Sixth Circuit is not alone in recognizing that many of the Johnson factors are subsumed within the initial calculation of hours reasonably expended at a fair market rate. This Court in Hensley, 461 U.S. at 434 n.9, pointed out that it is "usual" that such factors are so subsumed. Cf. Riddell v. National Democratic Party, 712 F.2d 165 (5th Cir. 1983) ("lodestar" need not be adjusted when adjustment factors considered in initial lodestar computation). See also, Third Circuit Task Force Report, supra, at 13-14.

The Northcross analysis is fully consistent with this Court's decisions in Hensley and Blum v. Stenson (hereinafter "Blum") 79 L.Ed.2d 891 2d (1984) which adopted the lodestar approach:

> "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. . . . Adjustments to that fee then may be made as necessary in the particular case." Blum 79 L. Ed. 2d at 895-896. Accord: Hensley, 461 U.S. at 433; See Third Circuit Task Force Report at 14-15.

Although cognizant of the difference between calculating a fee under a fee shifting statute, where Congressional intent is controlling, and under the judicially created "common benefit" exception, where equitable considerations govern, the Northcross "lodestar" formulation followed by the District Court was an appropriate method of determining the amount of the award in the instant proceeding. See, e.g., Philadelphia Division, Pennyslvania Telephone Guild v. Pennsylvania Telephone Guild, 573 F.Supp.

314 (E.D.Pa. 1983); Pawlak v. Greenawalt, 713 F.2d 972 (3rd Cir. 1983).

B. Petitioners Are Barred From Contesting The Calculation Of The Amount Of Attorney Fees Awarded By The District Court And Affirmed By The Sixth Circuit Because They Agreed To Waive Evidentiary Hearing, Consented To The District Court Making A Determination Solely On The Basis Of Affidavits Of Hours Expended And Office Rates Charged By Respondent's Counsel And Of Hourly Charges Of Comparable Attorneys In The Community For Like Services, And Failed To Identify Any Bases For Reducing The Hours So Submitted Or, The Hourly Rates Found Appropriate By The District Court.

The Petitioners contend that the District Court's calculation of attorney fees was flawed because no adjustment was made for "any duplicative time between the [Respondent's] attorneys' pre-litigation and non-litigation time," "clear

duplication between the attorneys in office time, as well as trial preparation and trial appearances," for differentials in rates "for office time as opposed to litigation time" and for "failure to submit contemporaneously kept and prepared time records." (Petition, pp. 10, 16).

Respondent concedes that Petitioners are entitled to call for an evidentiary hearing at which all of these matters may be inquired into, documents examined and counsel themselves subjected to cross-examination on their submissions.

However, at conference with the District Court on October 2, 1980 the parties agreed to waive evidentiary hearing on the issue of counsel fees and consented to the Court determining the amount based upon Respondent's counsel's affidavits, (itemizing the services, dates and hours spent on the proceeding and

appending pertinent biographical information and the power of attorney-fee agreement,) and the affidavits of all counsel setting forth hourly rates charged by counsel and other comparable attorneys in the community. (A-414-415). Because the counsel fee determination was to be made in this fashion, no time records or other evidence was offered with respect to the number of hours of service expended in the proceeding.

Surely Petitioners cannot consent to the Court's making a determination on the counsel fee issue without an evidentiary hearing and, in the same breath, claim that no such ajudication was properly made because of a lack of "back-up documentation" which can only be presented, examined and explained at an evidentiary hearing.

As this Court declared in Blum:

"We decline to consider petitioner's further argument that the hours charged by respondents' counsel were unreasonable. As noted above, petitioner failed to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged, see Hensley, supra, at ___ 76 L. Ed. 2d 40, 103 S.Ct. 1933, on the facts asserted in the affidavits submitted by respondents' counsel. It therefore waived its right to an evidentiary hearing in the District Court. See City of Detroit v. Grinnell Corp.,495 F.2d 448, 472-73 (2d Cir. 1974) (where facts are disputed, an evidentiary hearing is required before a district court determines a proper attorney's fee award). In view of the trial strategy it choose, petitioner waived its right to challenge in this Court, the District Court's determination that the number of hours billed were reasonable for cases of similar complexity." 79 L. Ed. at 898 n.5.

The instant proceeding is now in its twelfth year. The voluminous docket sheets and time summaries submitted by Respondent's counsel reflect, among other activities, preparation of some 28 motions and 24 memoranda, conduct of 23 days of trial and the submission of requests for several hundred findings of fact and conclusions of law. Although the actual number of hours devoted to the cause was much higher, lead counsel sought compensation for 1,244.5 hours and co-counsel for 482 hours.

The Petitioners failed to identify any hours which were unjustified or duplicative. Nevertheless, the District Court made an independent review and concluded that counsel "neither claimed unjustified hours nor duplicated each other's services." (A-419). Each counsel submitted a "standard billing rate,"

requesting no premium for time spent in litigation. (A-423).

Reviewing affidavits of rates of other counsel practicing in the community, the District Court found that lead counsel's rates "were in accord with the community standards for an attorney of his experience," except for the years 1975 and 1976, for which period the rates submitted were reduced from $85.00 to $80.00. (A-424) The rates for co-counsel were found to be "reasonable for an attorney of his experience during the period of time he was involved in this case." (A-424)

C. The Courts Below Properly Found That The Results Obtained By Respondent In Vindicating The "Free Speech" And "Assembly" Rights Of Union Members, In Substantially Democratizing Union Procedures And In Restructuring The Union's Exclusive Hiring Hall System So As To Assure Its Integrity Conferred A Substantial Benefit Upon Union Members Justifying The Counsel Fees Awarded And That No Part Of Their Compensation Was Attributable To Unsuccessful Unrelated Claims.

The District Court awarded Respondent's lead counsel $100,232.50 and his co-counsel $33,107.50.

Petitioners do not assert that the amounts are excessive in light of the Union's ability to pay. (Indeed, as the District Court noted, Local 18 is a state-wide union labor organization with some 16,000 members (A-10), and at the time of the proceeding reported income of $3 million, a payroll of $1.6 million and assets of $6 million.)

Rather, the thrust of their argument seems to be that the Sixth Circuit did not consider the "extent of success" or "results obtained," (Petition, p. 20), that there was "disproportionality of the attorney fee award as compared to plaintiff's recovery," (Petition, p. 8-9 n.3), and that the fee should have been reduced for hours expended on Respondent's unsuccessful claims (Petition, p. 18-19).

The relief granted Respondent Murphy included reinstatement to Union membership and expungement of the record of his suspension, injunctive relief assuring, inter alia, fair opportunity to work at the trade, compensatory damages in the amount of $10,000 and lost earnings in an amount still to be determined, however, on a "present value" computation, submitted by Respondent pursuant to leave granted in the District Court's Post-Judgment

Memorandum, Opinion and Order of October 14, 1984 (A-383-385), supports an allowance of $118,042 as of December 31, 1983. Furthermore, Murphy was also initially awarded $200,000 in punitive damages which was later remitted in order to achieve democratic reforms.

But, unlike Section 1988 cases such as City of Riverside v. Rivera, 763 F.2d 1500 (9th Cir. 1985) cert. granted, No. 85-224, the reasonableness of the attorney fees awarded is not to be judged by the personal relief Murphy achieved. It is rather to be viewed in light of the substantiality of the benefit conferred upon all the members of the Union. Respondent's success in this litigation corrected and prevented future abuse prejudicial to the rights and interests of the members. Hall v. Cole, 412 U.S. 1, 5 n.7, (1973) (hereinafter "Hall");

Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970).

In Hall this Court found the reinstatement of union membership of a dissident member expelled for introducing resolutions critical of the administration's undemocratic actions and policies justified the award of attorney fees:

> ". . . there can be no doubt that, by vindicating his own right of free speech guaranteed by Section 101(a)(2) of Title I of the LMRDA, [plaintiff] necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the 'chill' cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to

> the preservation of union democracy, they frequently prove beneficial 'not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs.' 412, at 8, quoting Yablonski v. United Mine Workers of America, 466 F.2d 424, 431 (1972).

So in the present proceding, Murphy, by vindicating his own Section 411 "free speech," "assembly" and "disciplinary due process" rights, advanced the interest of every Union member. (A-406)

But, he did much more.

He paved the way for recovery of union funds spent by officers in breach of their fiduciary duty. (A-248)

In exchange for vacation of his $20,000 punitive damage award against Defendant John Frank, he rid the Union of a dictatorial and oppressive officer and business agent. (A-382-383)

In exchange for vacation of a

$150,000 punitive damage award against the Union, he introduced a series of democratic reforms in the governance and administrative processes of the Union. (A-2-A3, A-461-A462, A-464)

The period during which election lists may be examined was enlarged. For the first time, candidates for union office are entitled to speak to the membership on behalf of their candidacies. While the court did not see fit to require the Union to abandon its policy of using the Buckeye Engineer as a forum for self-laudation and criticism of dissidents and permit access to this house organ for opposing viewpoints, it did require the publication to be used as a vehicle for educating the members of the Local as to their rights under the LMRDA on a regular semi-annual basis.

Perhaps most important of all, Murphy

put an end to use of the Union's exclusive hiring hall system as an instrument of political oppression. Dispatch telephones are now equipped with recording devices to provide a verifiable means of ascertaining the sequence in which job referral calls are made. Job orders and dispatches made pursuant thereto are posted weekly and registration cards and job orders are date and time-stamped. "Anti-steering" and "anti-discrimination" provisions are in force. (A-429-A457,A-461-A-462).

This relief, as the Sixth Circuit observed, "signified a substantial victory." (A-490)

Further, as the Sixth Circuit pointed out, the claims upon which Murphy did not prevail "were closely interrelated and arose from one common core of facts." (A-489-490) Indeed, all the unsuccessful claims were added to his complaint by

amendment either after the presentation of his case-in-chief or at the conclusion of trial to conform to the evidence. F.R.C.P. 15(b).

Even under the "prevailing party" fee-shifting statutes, where the focus is upon the successful claims rather than the benefit conferred, this Court expressly rejected the "mathematical approach comparing the total number of issues in the case with those actually prevailed upon," as here apparently urged by the Petitioners. See, Hensley, 103 S.Ct. at 1941 n. 11.

Downward fee adjustments may be appropriate only where a plaintiff failed "to prevail on claims that were unrelated to the claims on which he succeeded" because "a plaintiff may present in one lawsuit distinctly different claims for relief that are based facts and legal

theories" so that "counsel's work on one claim will be unrelated to his work on another claim" with the result that "work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved'." Hensley, 103 S.Ct. at 1940.

The narrowness of the unsuccessful "unrelated claim" exclusion from Section 1988 counsel fee awards is highlighted by Justice Powell's further comment:

> "It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be

viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. See Davis v. County of Los Angeles, 8 E.P.D. Paragraph 9444, at 5049 (CD Cal. 1974). Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." Hensley, 103 S.Ct. at 1940.

In the present case, remand of the attorney fee issue to the District Court in order to consider the relationship between the fee award and the result obtained is not justified.

It is clear that the relief requested by Plaintiff and denied by the District Court, including additional political campaign reforms, were all related to the claims upon which he prevailed, grew out of a common nucleus of operative facts and were based upon related legal theories. They were therefore not "distinct in all respects from his successful claims" within the meaning of Hensley.

II. THE FACT THAT RESPONDENT HAD NO FEE OBLIGATION TO HIS COUNSEL WHOSE COMPENSATION WAS CONTINGENT UPON COURT AWARDED ATTORNEY FEES DOES NOT AFFECT RESPONDENT'S ENTITLEMENT TO COUNSEL FEES AND REQUIRE THAT RESPONDENT AND HIS COUNSEL BEAR THE EXPENSE OF LITIGATION WHICH HAS CONFERRED A SIGNIFICANT COMMON BENEFIT UPON THE MEMBERS OF THE UNION.

Respondent's counsel undertook representation in this cause under a power of attorney and contingent fee agreement which provided that Respondent would not be "responsible for attorneys fees or any other . . . expenses" and that all "expenses will be defrayed through subventions from the American Civil Liberties Union and the Legal Aid Society of Cleveland."[1]

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1. The withdrawal of financial support for this litigation by the Legal Aid Society of Cleveland and the American Civil Liberties Union because of budgetary contraints resulted in the incurring of substantial expenses which Respondent has either paid or for which he is obliged to reimburse his counsel.

Counsel were "empowered and directed to seek counsel fees and reimbursements for . . . expenses" and were "entitled to retain whatever counsel fees a court . . . may direct in compensation for their services rendered in my behalf."

Although recognizing that the absence of a fee obligation does not affect a client's entitlement to an award under fee-shifting statutes, Blum, 79 L. Ed. at 898 (Legal Aid Society of New York entitled to fee based on "prevailing market rate"), Petitioners now argue that such an obligation is essential to an entitlement under the "common benefit" exception, else there can be no "unjust enrichment" of the benefitted class.

This issue was neither presented to nor passed upon by the Court of Appeals.

It is patently without merit.

The enrichment is "unjust" regardless

whether it comes at the expense of a party or his attorney. The attorney does not merely stand in the shoes of the client, nor will his claim necessarily be measured by the contractual obligation of the client.

> "An attorney may agree to take a case on a basis that will not fully compensate the time and effort to be expended because of the expectation that the lawsuit will create or preserve a fund for the benefit of a broader class. To the extent the contract with the client affords the attorney less than the market value of his or her time and effort, the attorney has incurred a loss in the course of conferring benefits upon others. That loss is the measure of the unjust enrichment to the non-client beneficiaries. . . . The common benefit theory, for these purposes, is merely a corollary of the common fund principle; . . . but is grounded upon the same principle of unjust enrichment." Berger, Court Awarded

Attorneys' Fees: What is "Reasonable"? 126 U. of Pa. L. R. 281, 299-300 (1977) (footnotes omitted).

In LMRDA proceedings there is another powerful reason for awarding attorney fees, even in absence of any fee obligation of the plaintiff to his counsel:

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it." Hall, 412 U.S. at 12, quoting 462 F2d at 780-781.

Counsel for plaintiff in Hall, Mr. Justice Clark pointed out, had undertaken the case "largely on a pro bono publico basis" so that "Cole and his counsel bore the cost of litigation themselves." Cole v. Hall, 462 F2d 777, 778, 780 (2nd Cir. 1972).

As Judge Shapiro aptly explained in Philadelphia Division, Pennsylvania Telephone Guild v. Pennsylvania Telephone Guild, 573 F.Supp. 314 (E.D. Pa. 1983):

> "Plaintiffs are not precluded from recovering a fee award because they will not otherwise be liable to their attorneys or because . . . [an outside organization] has already paid the plaintiffs' counsel the amount billed to them. Defendants misconceive the common benefit theory on which plaintiffs are entitled to an award of fees. . . . [f]ee shifting in this action to vindicate statutory rights bestows a common benefit and it is equitable for the fees and expenses to be paid from

> the common treasury and shared by all of . . . the union members who gained protection for their right to choose or reject alternative constitutional proposals in a fair and democratic manner with provisions for fair dissemination of views." See also, Pawlak v. Greenawalt, 713 F2d 972 (3rd Cir. 1983).

Petitioners are not able to provide either authority or policy to support the proposition that the existence of a fee obligation is an essential precondition to the award of counsel fees to the successful plaintiff under the "common benefit" equitable exception to the "American Rule."

This Court ought not to overrule Hall.

III. THE AWARD OF ATTORNEYS FEES IN THIS PROCEEDING IS INDEPENDENTLY JUSTIFIED UNDER THE "BAD FAITH" EXCEPTION TO THE AMERICAN RULE AND UNDER STATE LAW BECAUSE THE VIOLATION OF RESPONDENT'S LMRDA RIGHTS WAS THE PRODUCT OF PETITIONERS' OUTRAGEOUSLY MALICIOUS AND OPPRESSIVE MISCONDUCT.

The District Court found:

> "These defendants have intentionally, willfully and maliciously moved on all fronts to suppress plaintiff as a member of the dissident faction of Local 18." (A-402)

Relying on this Court's dicta in Hall that a federal court may award counsel fees to a successful party when his opponent has acted "in bad faith, vexatiously, wantonly or for oppressive reasons," which bad faith "may be found in actions that led to the lawsuit," 412 U.S. at 5, 15, the District Court held that Respondent was alternatively entitled to an award of attorney fees on this ground. (A-402)

The Court of Appeals, bound by its earlier decision in Shimman v. International Union of Operating Engineers, Local 18, 744 F2d 1226 (6th Cir. 1984) (en banc), cert. denied 105 S.Ct. 1191 (1985) declined to affirm the award on this basis. (A-486-487). In Shimman the Sixth Circuit had held that "bad faith" in the acts giving rise to the substantive claim, could not form the predicate for a fee award.

With respect, the Sixth Circuit's position on the matter is contrary to this Court's view of the matter in Hall and to subsequent decisions of other Circuit and District Courts; e.g., Richardson v. Communication Workers, 530 F2d 126 (8th Cir), cert. denied, 429 U.S. 824 (1976); Fairley v. Patterson, 493 F2d 598 (5th Cir. 1974); McQuiston v. Marsh, 707 F2d 1082 (9th Cir. 1983); Bise v.

International Brotherhood of Electrical Workers, 618 F2d 1299 (9th Cir. 1979).

There is no good reason why Petitioners, having forced Murphy to go to court to correct the deliberate and malicious violations of his LMRDA rights, should not be obliged to pay for the proceeding.

Moreover, Respondent prevailed on his pendant state law claims of assault and battery and conspiracy (A-275-A276, A-290). As the Sixth Circuit noted in Shimman:

> "Ohio law allows attorney fees to successful plaintiffs in assault and battery cases, or in any case in which punitive damages are allowable. E.g., . . . Columbus Finance, Inc. v. Howard, 42 Ohio St.2d 178, 327 NE2d 328 (1975)...." 744 F2d at 1237.

Accordingly, the instant award of attorney fees is further independently supported on state law grounds.

CONCLUSION

Respondent respectfully submits that the instant Petition for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 30, 1985 ought to be denied because the judgment is consistent with prior and controlling decisions of this Court and with the decisions of other Circuits on the same questions, raises no issue similar to that raised by a case pending before this Court, and presents no issues of general importance to the public but rather turns upon an analysis of the facts peculiar to the proceeding.

Respectfully submitted,

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